United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
Thomas P. O'Sullivan

Docket No. 75-1009

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE H. BENNETT, JR.

Appellant.

Appeal from the United States District Court for the Northern District of New York

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Were the convictions obtained in violation of the defendant's privilege against self-incrimination?

2. Were the defendant's guilty pleas voluntary?

3. Did the federal charges subject the defendant to double jeopardy?

A R G U M E N T

POINT I

THE DEFENDANT'S CONVICTIONS WERE NOT OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

As appellee perceives the appellant's argument, it is contended that the appellant pleaded guilty to the

federal charges because of statements or admissions he had made to the State Police with respect to the federal charges, which indicated that he was guilty of the federal charges. Because that information was available or made available to federal agents, the appellant had no defense to the federal charges. Since that information was obtained illegally by the State Police, the appellant should now be allowed to withdraw his guilty pleas to the federal charges; and moreover, since appellant believes that it is doubtful that the federal authorities would have sufficient evidence against the appellant without the State information the federal charges should be dismissed.

Whatever the merits of that argument might be as a basis for suppressing the information illegally obtained, or the fruits thereof, if in fact such information was illegally obtained, it is clear that this is not the proper forum nor the proper time for such an argument.

The only statement, admission, or confession introduced in evidence against the appellant were those given by appellant in open court when he pled guilty to the federal charges. Therefore, appellant's Fifth Amendment privilege against self-incrimination could not be violated unless appellant's plea was not voluntary.

The voluntariness of statements made to the State Police; the extent of their use by federal authorities; and the sufficiency of the federal case, without such statements, are factual matters, not raised below, which have never been

litigated, and are not properly before the Court now on appeal.

Any defense that might have been raised by such arguments are waived by the appellant's subsequent admission of guilt in open court, unless that admission of guilt was, itself, compelled. United States v. Brady, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468 (1970). (In particular see the discussion at 397 U.S. 1472-1474, 90 S.Ct. 754-757).

Note, that the other cases cited by appellant also do not support the contention that tainted confessions acquired prior to a guilty plea can support the withdrawal of such plea where such plea is voluntarily and intelligently made upon advise of counsel. United States v. Michael, 426 F.2d. 1067 (7th Cir. 1970), for example suggests that the Fifth Amendment privilege against self-incrimination must be timely made at the earliest possible time after the defense is available.

The only argument appellant offers is the legally and factually unsupported allegation found under Point II of Appellant's Brief at p.8, that appellant "was unaware that he could challenge the use of the statements obtained by state authorities...(since)...(i)f he had been aware of his rights, he would certainly have asserted them."

The bare boned allegation that the appellant was unaware of a possible defense, in light of the fact that he was represented by counsel when he pled not guilty, when he requested and consented to disposition under Rule 20 of the Federal Rules of Criminal Procedure, and when he pled guilty,

can hardly be any basis for the contention that appellant should be allowed to withdraw his guilty plea because statements given to the State Police, but not used against him were tainted, nor any basis for the contention that his plea was therefore involuntary and not intelligently made. United States v. Brady, supra.

It is not known nor can we now determine what the appellant was aware of, or what or how strong he thought the evidence against him was, or what he thought his best option might be. However, in the absence of detailed evidentiary facts to the contrary we can only assume that he acted upon the advice of competent counsel. Therefore, unless it is to be a requirement that every conceivable defense be raised before counsel can advise his client that a plea of guilty may be in his best interests, there can be no basis for the withdrawal of a plea of guilty predicated upon the bare allegation that the accused was unaware of a particular possible defense, which may or may not have any merit by itself, or which even if successfully raised would not alter the judgment that the accused would be convicted.

Allowing the withdrawal of a plea on that basis, in effect would sanction a rule which would allow the counsel handling the appeal to second-guess the counsel handling the trial, resulting inevitably in a yo-yo effect between the district court and the appellate court of a single case numerous times. Moreover, it would virtually eliminate guilty pleas since there is always some conceivable defense that might be raised.

It should be noted in this respect that appellant was represented by two different counsels on the federal charges and apparently a third counsel on the state charge, and yet contends that he was never advised or made aware of a viable defense.

The best inference from appellant's allegation that he was unaware of this defense is that either he misapprehended the viability of such defense then or now. In either case a reviewing court cannot look into the subjective mental processes of a defendant to determine what part misconceptions might have played in motivating his guilty plea. Such a rule would become an unmanageable ad hoc proceeding every time a defendant received a sentence that did not meet his expectations. Calabrese v. United States, 507 F.2d 259 (1st Cir. 1974).

It is therefore submitted that the arguments raised under Point I of Appellant's Brief are not properly raised on appeal, and accordingly form no basis for the conclusion that appellant's convictions were obtained by use of unlawfully obtained statements made to state authorities.

POINT II

THE DEFENDANT'S GUILTY PLEAS WERE VOLUNTARY.

For the reasons expressed in the analysis under Point I of Appellee's Brief, the argument presented under Point II subpart (1) of Appellant's Brief is similarly defective, since in essence it is the same argument, i.e., appellant was unaware of a possible defense to the federal prosecution arising out of allegedly tainted statements made to the state authorities.

As indicated, under Point I of Appellee's Brief the only cognizable basis for withdrawal of appellant's guilty plea on this appeal is if the plea itself was not voluntary. Appellant's counsel, under Point II subpart (2) of Appellant's Brief, raises two contentions not raised below by appellant with respect to the voluntariness of the plea, itself, as opposed to appellant's belief that he had no defense.

A) The sentencing court should have informed him that the federal sentence would run consecutively to the previously imposed state sentence.

B) The prosecutor failed to keep an implied plea bargaining arrangement.

The general rule is that where, as here, the accused acknowledges in open court that he had not been pressured to plead guilty nor made any promises about his possible sentence, (See, Appendix, p. 20a, 21a), and where the accused is advised of the maximum penalties against him and acknowledges that he understands the penalties, (See, Appendix, p. 21a), it is of no consequence, for purposes of withdrawal of his guilty pleas, that he had been led to believe by his counsel that the federal sentences would run concurrently with the existing state sentence, since the rule requiring that the sentencing court determine that the plea was voluntary, and made with understanding of the consequences, does not require that the accused be advised of every collateral consequence of his plea, and the fact that service of a federal sentence would follow the previously imposed state sentence was not a definite practical consequence of the plea, within the rule pertaining to acceptance of guilty pleas.

United States v. Wall, 500 F.2d 38 (10 Cir. 1974); Cert. Denied, 95 S.Ct. 504 (1974).

As for the first contention, therefore, the failure of the sentencing court to inform the accused that the sentence to be imposed would be consecutive to the sentence he was presently serving is no basis for withdrawal of a guilty plea. United States v. Saldana, 505 F.2d 628 (5th Cir. 1974). The rule governing acceptance of a guilty plea does not affect the longstanding rule that a sentencing court is not bound to inquire whether a defendant is aware of the collateral effects of his plea. The rule was not intended to burden or extend the court's obligation to cover ancillary or collateral consequences of an accused's admission of guilt, but to insure that there was a factual basis for the plea and the defendant understood the consequences of the sentence the sentencing court was to impose. Michel v. United States, 507 F.2d 481 (2nd Cir. 1974).

With respect to the second contention raised by appellant there is a Third Circuit case which arguably lends some support to appellant's misrepresentation theory. That case would require a hearing even if defendant's counsel innocently misrepresented that an arrangement had been made with the prosecutor with respect to the sentence to be imposed, and the defendant could establish that he pled guilty in reasonable reliance upon the misrepresented information. United States v. Hawthorne, 502 F.2d 1183, 1886 (3rd Cir. 1974).

However, that court also held that if the statements by counsel were mere predictions of the likely sentence that

no hearing is warranted, and that a defendant's statements at a Rule 11 proceeding should be accorded great weight.

On the facts of Hawthorne it was not clear from the petitioner's pro se letters whether there had in fact been a misrepresentation by counsel with respect to an arrangement upon which defendant relied or whether defendant misapprehended counsel's advisory predictions. Accordingly, the court held that the district court had not erred in refusing to grant an evidentiary hearing on the record before it, since such a hearing is not required except for good cause shown. However, since the petitioner was without counsel at that time and his petition was inartfully worded the court remanded for the limited purpose of determining the nature of the petitioner's allegations by affidavit in order for the district court to futher determine whether an evidentiary hearing was necessary.

Clearly, no hearing, evidentiary or otherwise was required in the instant case, since no allegations with respect to misrepresentation of an arrangement with the prosecutor were made below, whatsoever. See, the District Court's Memorandum-Decisions and Orders of March 12, 1974, and April 12, 1974, and Appellant's pro se letter of April 9, 1974.

The allegation of an unkept deal appears out of whole cloth for the first time on appeal, but even now at this late date the alleged unfulfilled bargain is expressed in language so vague and so ambiguous as to defy credibility let alone require an evidentiary hearing, or any kind of hearing, to determine the substance of the allegation, and certainly it is no basis for withdrawal of the plea. Indeed, the language is

so artfully ambiguous that it isn't clear that the appellant is in fact alleging that there was an unkept deal.

The statement, "Appellant understood there to be an implied arrangement with the U.S. Attorney whereby the federal and state sentences would run concurrently," (Appellant's Brief, p. 7), raises more questions than it answers. What led the appellant to such an understanding? Who led him to believe that? How and by whom was this arrangement implied? Was the "implied arrangement" between the Pennsylvania prosecutor and assigned counsel there, or between the New York prosecutor and the assigned counsel here, or between appellant and one or both of the prosecutors, or conveyed to appellant by one or both of the assigned counsels? What does "implied arrangement" mean? Was there an arrangement or did appellant only think there was an arrangement?

The equally artful phrase, "and the possibility that the misunderstanding was not caused by a conscious misrepresentation of the U.S. Attorney is of no consequence," (Appellant's Brief, p. 9), is equally clouded in vague innuendo. What is the inference to be drawn from that language? Some known or unknown representative of either one of the United States Attorneys' offices probably made a conscious misrepresentation to either one of the assigned counsels or to the appellant, by implication, that he would arrange with the sentencing judge to have the federal sentence run concurrently with the state sentence in order to induce his plea of guilty, but we need not get into the particulars of that, it being of no consequence, since its clear that appellant as a result was not fully aware of the consequences of his plea.

Grasping the logic of that argument is akin to chasing a will o' the wisp. Clearly, under the law, the sentencing court is not required to advise the accused of whether the sentence will be concurrent or consecutive, since that aspect of the sentence is not a direct consequence of the plea. It is sufficient if a federal judge advise the accused of the maximum penalty which may be faced under the federal charges, which was done here. (Appendix, p. 21a). United States v. Wall, supra; Michel v. United States, supra.

The only basis remaining for withdrawal of the plea, with respect to this argument of the appeal, is the contention that there was an unkeptdeal. To prevail on that theory, however, requires the appellant to at least allege that there was a deal, and to present, at least by allegation some evidentiary facts, to indicate to an objective reviewer that this so-called "implied arrangement" consciously misrepresented by the representative of the government, ever existed or could have possibly existed. In the absence of any detailed evidentiary facts no hearing was required below and no further hearing with respect to the matter is required now. O'Neil v. United States, 486 F.2d 1034, 1036 (2nd Cir. 1973); United States v. Miranda, 437 F.2d 1255, 1258 (2nd Cir. 1971).

The oblique hints of an unkept bargain made by insinuation in this appeal is nothing more than a remote intimation. The allegation of a deal, if it be an allegation is pure innuendo, totally without substance, because there never was any deal implied or otherwise, as will be reflected by simple analysis of the factual situation.

The plea arises out of a Rule 20, Federal Rules of Criminal Procedure, disposition of an indictment from the Middle District of Pennsylvania, wherein, the appellant requested permission to plead guilty to that indictment in the Northern District of New York.

The prosecutor and the assigned counsel in the Northern District of New York do not enter into the situation until after the appellant had already decided to plead guilty. Under a Rule 20 disposition the only course of action for a defendant is to plead guilty. There is no need to induce his plea of guilty by bargaining. There is nothing to bargain for, since the appellant had already requested to be allowed to plead guilty, and that is the only option he had for purposes of his plea in the Northern District of New York.

If, there were a deal it would not arise out of a Rule 20 disposition, since the prosecutor in the district where the plea is to be entered has no interest in the case. If the defendant does not plead guilty he stands trial in the district where the indictment was filed. It is of no concern to the prosecutor in the district where the defendant seeks to plead guilty whether he pleads or not. Moreover, the prosecutor in the Northern District of New York not only would not but could not enter into any arrangement concerning an indictment from the Middle District of Pennsylvania, since the prosecutor there has control of the case.

If, therefore, there were any deal it would have to have been made with the prosecutor in the Middle District of Pennsylvania. The appellant appeared there for arraignment on October 18, 1973, at which time counsel in that district is

assigned, and appellant plead not guilty, and trial was set for November 12, 1973. (Appendix, p. 2a). During the time between arraignment and trial appellant is there in Pennsylvania. (Appendix, p. 14a). In that interim time counsel is apparently apprised of the government's case, and in turn apparently advises the appellant of the evidence against him. (Note that at this time there isn't even a file concerning the appellant in the Northern District of New York).

The appellant apprised of the case against him is apparently advised to plead guilty, and accordingly withdrew his not guilty plea. (Appellant's Brief, p.8). That decision had to have been made while the appellant is in Pennsylvania or else the trial would have commenced November 12, 1973. On or prior to that date the appellant would have had to have requested a Rule 20 disposition. He was in Pennsylvania for trial, and would not have been sent back to New York, since he would have to be made accessible to defense counsel. The prosecutor in Pennsylvania is certainly not going to send him back to New York to plead on his own volition.

The alleged deal would therefore have to occur before November 12, 1973, in Pennsylvania. Obviously, if there had been a deal the appellant would have plead inPennsylvania, since the Pennsylvania prosecutor certainly would not have had any influence on the federal judge in the Northern District of New York, as both the prosecutor and defense counsel in Pennsylvania would have known. There accordingly could not have been any implied arrangement conveyed to appellant by either of them suggesting that appellant request a Rule 20

transfer to the Northern District of New York where an arrangement had been made with the federal judge in that district.

After that transfer is granted the only course open to appellant in the Northern District of New York is to plead guilty, and accordingly there is no need to induce a plea by bargaining. Moreover, appellant's counsel isn't even going to attempt to make a bargain since no bargain is possible, as both appellant's counsel and appellant knew. (Appendix, p.19a):

> Mr. Biscone: My client is ready to plead guilty to both counts of the indictment.
>
> The Court: Which he must do.
>
> Mr. Biscone: That has been explained to him.

In light of the facts, and not innuendo, there never was any deal. On these facts no deal could have been possible. If there had been a deal in Pennsylvania the appellant would have plead in Pennsylvania. After that point there isn't any reason for a bargain, he had already committed himself to plead guilty. Even under the Third Circuit rationale which would allow withdrawal of the plea if defendant's own counsel misrepresented that there had been an arrangement, it would not aid appellant here, since the test requires that the misrepresentation by counsel must induce reasonable reliance on the part of the accused influencing his decision to plead guilty. United States v. Hawthorne, 502 F.2d 1183, 1186 (3rd Cir. 1974).

The fact that appellant requested a Rule 20 transfer dispells any notion that his Pennsylvania counsel might have innocently misled him concerning an implied arrangement. If

his New York counsel did so, it would be of no consequence in any event, since at that point appellant had already decided to plead guilty, and therefore his plea could not have been induced by reliance upon an innocent misrepresentation by his New York counsel concerning an implied arrangement.

What is even more illuminating, however, is the "deal" itself. The deal is that the prosecutor would arrange to have the federal sentence run concurrently with the state sentence. Appellant faced a maximum imprisonment of ten years. Presumably if he received the maximum penalty he would not object as long as it were concurrent with his state sentence. He objects to three years, but would not object to ten. The very suggestion is ludicrous. The "deal" is pure fantasy.

The appellant, obviously some one who knows something about sentences and sentencing, (See Appendix, p. 13a, 14a, 15a with respect to the discussion concerning credit for time served while on detainer), simply misjudged what his sentence would be. Its dubious that he needed any advice as to how to predict the possible sentence, but if he did, that is all his New York counsel could provide, i.e., advice as to the predictable sentence.

Here, appellant or his counsel simply guessed wrong. Not because the sentencing judge vindictively sought to add on additional punishment, which could have been done by simply making the sentence greater, but because of the judge's concern for rehabilitating the appellant. Being aware of the appellant's background from the pre-sentence report

he concluded that appellant needed help in rehabilitating himself, and further concluded that the state institution where he was presently incarcerated did not have the facilities for the assistance the appellant needed, and accordingly determined that the appellant needed to be at an institution which had the requisite facilities for a sufficient period of time to affect a change in the individual. Note the discussion, (Appendix, p. 13a), wherein the court points out that a man of appellant's intelligence should be able to do better, indicating that at still a young age appellant had frequently been in jail with no apparent effect, and accordingly the court felt compelled to sentence the appellant to prison. Not, however, to simply serve time, but with the hope that the appellant would obtain some help in the federal institution, which he apparently was not getting in other institutions.

There is no sinister misrepresentation by the prosecutor to induce a plea by a defendant who then reneges, and as a result the poor defendant is cruelly punished by a harsh vindictive judge. The appellant is simply miffed and piqued because his sentence was greater than he thought it would be. This is clear from the appellant's pro se letter to the district court, wherein he claims that his sentence was cruel and unusual punishment under the constitution, in that the federal sentence should be concurrent with the state sentence, since the federal crime was the same as the state crime, because he could not have committed the state burglary without transporting the stolen

car to the site of the burglary.

Obviously, there was no case for the contention of cruel and unusual punishment, since the imposition of even the maximum statutory sentence on each count of the indictment would not be cruel and unusual punishment, and would only be subject to review on appeal for manifest abuse of discretion, which is certainly not evident here in view of the lenient two year sentence out of a possible ten year maximum for a defendant with a prior record. United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591 (1972); United States v. Johnson, 507 F.2d 826 (7th Cir. 1974).

There, also, was no mention of any unkept deals. The argument that the sentences should have been concurrent germinated from appellant's misconception with respect to double jeopardy, not because he felt the prosecutor or the judge reneged on any deal.

With respect to an alleged unkept plea bargain the plea transcript itself is a highly relevant subject of inquiry, and where as here, that transcript reflects without conflict or equivocation that no plea bargain had been made or promised, (Appendix, p. 20a, 21a), no relief is warranted. Frank v. United States, 501 F.2d 173 (5th Cir. 1974).

The withdrawal of a guilty plea on the basis of an unkept bargain is not warranted where there has been no representation by counsel that a deal had been made. United States v. Simmons, 497 F.2d 177 (5th Cir. 1974). The representation of a deal has yet to be made in the instant case, except by insinuation, and a bare bones allegation of an unkept deal is

insufficient for withdrawal of a guilty plea. Moody v. United States, 497 F.2d 359 (7th Cir. 1974).

The entire record here suggests nothing more than that the appellant was disappointed with the sentence he received. There is no evidence here that his plead was coerced, or induced by false promises, or made without comprehension of the charges against him. The district court fully complied with the rule designed to assure that guilty pleas are voluntarily entered, and there is not a scintilla of evidence that the prosecutor or defense counsel either in New York or Pennsylvania had promised the appellant anything with respect to sentence let alone that a particular sentence would be imposed. In the absence of any such evidence or evidence of impropriety with the Rule 11 proceeding, the fact that the appellant believed that he would receive a different sentence does not indicate that his guilty plea was not voluntary. The imposition of a sentence other than that expected by the appellant or predicted by his counsel is insufficient ground for vacating his sentence. See, Calabrese v. United States, 507 F.2d 259 (1st Cir. 1974).

It is therefore submitted that the defendant's guilty pleas were voluntary.

POINT III

THE FEDERAL CHARGES DID NOT SUBJECT THE DEFENDANT TO DOUBLE JEOPARDY.

Appellant's counsel on appeal is somewhat reluctant to raise this issue, and does so only at the insistence of the appellant. Yet its clear that this has been appellant's argument from the very beginning, and this is his only argument.

In the process of confessing to his implication in a state burglary the appellant apparently reveals information with respect to the federal crimes which are transmitted, as they should be, to the federal authorities.

If the state confession had been legally defective, and that is not known, there might have been a basis for suppression of that statement and the leads developed from it as was discussed under Point I. But, of course, this is not the proper forum for that claim, and the appellant has waived his right to raise that defense now by virtue of his guilty pleas in both the state and federal prosecutions. United States v. Brady, supra.

However, even if the claim still had validity there is no indication that the federal authorities would not have been able to independently develop a case against the appellant. The salient fact that cannot be avoided is that the State Police had possession of the stolen vehicle which would have to be returned to the rightful owner, which would lead to a federal investigation, which probably if not inevitably would have led to the appellant.

Nevertheless, appellant perceives the transmittal of the information as being unfair. Note that he is not concerned with how it was obtained, since he does not challenge the state conviction. His complaint is that it was transmitted. Interestingly enough, he is not really concerned that there are two prosecutions, since although he could have raised the "coerced confession - double jeopardy defenses" below, he elected to plead guilty to the federal charges. His real complaint is that the state and federal sentences were not made concurrent,

which he perceives as being double punishment, and hence cruel and unusual. In essence he raises the argument of double jeopardy.

The short answer to his argument is, of course, that successive state and federal prosecutions even where they are based on the same acts arising out of a single episode are not, under the accepted view of the law, in violation of either the Fifth or the Fourteenth Amendments. Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676 (1959); Abbotte v. United States, 359 U.S. 187, 79 S.Ct. 666 (1959). The argument being that since each entity is sovereign, each may prohibit the same act, and the commission of the prohibited act would therefore be an offense against the peace and dignity of both sovereigns, and accordingly both may punish the violator.

For recent situations following the double-sovereign rationale see United States v. Delay, 500 F.2d 1361 (8th Cir. 1974), (Defendant previously plead guilty to state charges arising out of the same acts or episode), United States v. Burke, 495 F.2d 1226 (5th Cir. 1974), (Federal prosecution for extortion after acquittal in state prosecution for extortion as well as other crimes arising out of same acts), United States v. Vaughan, 491 F.2d 1096 (5th Cir. 1974).

The double sovereign theory is still good law, and would be dispositive of appellant's claim here. However, there is a germ of genius in appellant's original contention that a confession made on a state charge should not be used against a defendant in a subsequent federal prosecution arising from the same act or episode. A conviction under the state charge would not be admissible, or at least not unless the defendant took the stand, and then only to impeach his credibility, and arguably

since the conviction is so close in time and nature it might not be admissible even for that purpose because of its highly prejudicial impact.

Appellant's notion that there is something inherently unfair in being punished twice for the same act regardless of sovereign, particularly where the proof of one prosecution establishes the proof of the other, is also not without merit. Such activity may not be strictly precluded by the double jeopardy clause of the Fifth Amendment, which prohibits a re-trial for the same offense, since under the double sovereign theory they are separate offenses. However, its not clear that when the Fifth Amendment was ratified that the present bifurcated court system was contemplated, nor was the federal expansion into the area of criminal clearly envisioned. Arguably, therefore, the framers may have considered the principle of avoiding two trials or two punishments for the very same act, as controlling, even if such act would be offensive to both sovereigns, rather than the technical construction that the same act may be the same or a different offense against each separate sovereign.

The principle seems to be a well established notion of American jurisprudence. Aside from the double jeopardy clause itself, there is the full faith and credit clause of Article IV Section I of the Constitution, which would generally preclude relitigation of civil cases in different states or trials de novo in federal court after judgment in a state court. There is also the rules with respect to joinder, and lesser included offenses, collateral estopped and res judicata, etcetera.

It is an area of the law open to much discussion, and perhaps in a proper case the argument that the principle of one

trial and one judgment for the same act is inherent in the due process clause of the Fifth and Fourteenth Amendments may prevail, or perhaps the argument that the privileges and immunities clause of the Fourteenth Amendment would preclude a state from retrial of a federal acquittal, and that the privileges and immunities clause of Article IV Section 2, Subsection 1, would preclude the retrial of a state acquittal, would prevail, coupled with the argument that no legitimate governmental interest is served by retrial of a prior conviction for the same act, by either sovereign, since the notion of double punishment is strictly retribution rather than rehabilitation, and accordingly contrary to the due process clause.

Whatever the merits of those arguments, however, it is clear that they would not be applicable to the instant case. Nor is the argument raised by Appellant, which needs to cast the issue in terms of a confrontation between the "Same Evidence Test" and the "Same Transaction Test".

"The Same Evidence Test", followed by the Second Circuit in United States v. Cioffi, 487 F.2d 492 (2nd Cir. 1973), would allow a retrial after acquittal, by the same sovereign, if the subsequent trial is based on a different charge which would require different proof than what was required on the prior charge, even though both charges arise out of the very same transaction. See also, United States v. Tramunti, 500 F.2d 1334 (2nd Cir. 1974); United States v. Gugliano, 501 F.2d 68 (2nd Cir. 1974).

The "Same Transaction Test", first postured in the concurring opinion of Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970), has never been wholly approved

by any court, but has been accorded scholarly respect, would preclude the retrial of crimes arising out of the same transaction, after acquittal on one such charge.

However, even where the test is accorded some deference it would not reach the broad scope contemplated by appellant's argument, that separate trials could not be had for even distinct crimes arising from the same series of events. See Dombrowski v. Johnson, 488 F.2d 68 (6th Cir. 1973), (limiting the effect of Ashe to precluding separate trials for crimes arising out of a single factual episode, as in Ashe, for example, the robbery of six victims at one time could not be the subject of six separate trials, but if the robberies occurred at different times or places, sufficiently remote, then separate trials would be permissible); note also Maton v. Swenson, 488 F.2d 1060 (8th Cir. 1973), (which distinguishes Ashe on the ground that the first trial in Ashe resulted in acquittal, and thus double jeopardy attaches, but where the first trial results in conviction double jeopardy does not attach).

It should also be noted that there is no dispute between United States v. Cioffi, supra, and the majority holding in Ashe v. Swenson, supra, which merely applies the principle of collateral estopped to the area of criminal trials, so that an issue litigated in one trial cannot be relitigated in a subsequent trial, and Cioffi is specifically approved by the Supreme Court in Cuizio v. United States, 94 S.Ct. 2410 (Memorandum Decisions) denying certiorari in Cioffi.

Perhaps in a proper case Cioffi should be reconsidered and some notion of the "same transaction" test may be appropriate.

The difficulty is to determine what is meant by the term "same transaction". At one point it is defined as "one criminal episode", Ashe v. Swenson, 90 S.Ct. 1195, and at another point defined as "connected transactions...(forming) ...a common scheme," (90 S.Ct. 1200).

On the facts of Ashe there may be some merit to the notion that the robbery of six persons at the same time or place is one criminal episode and ought to be limited to one trial, but if the same six persons are robbed at different times or robbed by different persons or at different places the robberies are distinct and ought to be tried separately even though all the robberies were part of a common scheme.

In the instant case, for example, leaving aside the issue of double sovereignties, if the appellant had been charged by the state with car theft, then the argument could be made that the transportation of the stolen vehicle was part of the same criminal episode or the same common scheme, but if six vehicles are stolen does it make sense to say that this is a single crime, because the thefts were part of a common scheme.

Moreover, does it make sense to say that an escaping prisoner who kills a guard, steals an auto, robs a bank, a gas station, or jewelry store, hijacks a plane, etcetera, has committed only one crime or that all the crimes should be the subject of a single trial, or that if acquitted for bank robbery he should not be tried for hijacking the plane, because all the acts were connected to the common scheme to escape.

The point being that if the same transaction rationale has validity it needs to be more clearly defined with respect to the numerous factual situations in which it might arise.

The argument presented by the appellant in the instant case is that since a car was necessary to transport the burglar to the scene of the burglary his transportation of the stolen vehicle, interstate, was part of the common scheme to commit the burglary.

However, its obvious that the burglary could have been committed without the car theft, or the car theft without the burglary, and obviously the car need not have been stolen in another state. It is therefore difficult to see how the state burglary here, and the interstate transportation of a stolen motor vehicle is sufficiently connected so that it can fairly be argued that it was part of a common scheme, even under the most liberal construction of the "same transaction test."

Nevertheless, even if appellant's theory were accepted there still would be no basis for relief on this appeal. The indictment charges the appellant with two counts of interstate transportation of a stolen motor vehicle, and count one, involving the theft of a vehicle in late March of 1973, which was transported from Colorado to Pennsylvania, has absolutely no connection to the burglary in New York in early May of 1973.

The sentencing court ordered a sentence of two years on each count of the indictment to run concurrently. (Appendix p. 14a). Therefore, even if appellant's argument prevailed it would only have application to count two of the indictment, and even if that count were overturned, count one of the indictment, to which he pled guilty, would still remain, and the sentence would be exactly the same.

It is therefore submitted thatthe federal charges did not subject the defendant to double jeopardy.

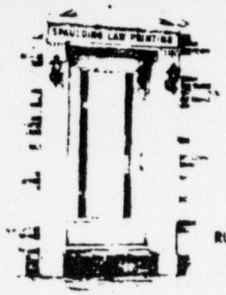
CONCLUSION

THE CONVICTION AND SENTENCE SHOULD BE AFFIRMED.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney for
Northern District of New York

THOMAS P. O'SULLIVAN
(Of Counsel)



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LETTER OF TRANSMITTAL

Date: March 28, 1975

Hon. A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
Room 1702 U.S. Court House
Foley Square
New York, N. Y. 10007

Re: United States of America v. George H. Bennett, Jr.
Docket ~~Index~~ No. 75-1009

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

[--] ~~Records~~

[25] Briefs

[--] ~~Original Record enclosed~~

[--] ~~Original Record to come~~

Very truly yours,

Everett J. Rea

cc: Thomas P. O'Sullivan, Esq.
Assistant U.S. Attorney

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AFFIDAVIT OF SERVICE

RE: UNITED STATES OF AMERICA v. GEORGE H. BENNETT, JR. (Docket No. 75-1009

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of JAMES M. SULLIVAN, JR., United States Attorney, Attorney for Appellee,
(s)he personally served three (3) copies of the printed ~~[Record]~~ [Brief] ~~[Appendix]~~ of the above-entitled case addressed to:

JOHN A. ACAMPORA, ESQ.
Attorney at Law
109 Church St.
New Haven, Conn. 06510

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on March 28, 1975.

Everett J. Rea

Everett J. Rea

Sworn to before me this 28th
day of March , 19 75

Russell A. Moloughney
Commissioner of Deeds

cc: Thomas P. O'Sullivan, Esq.
Assistant U.S. Attorney

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